CASE NO. 16-71915 [CONSOLIDATED WITH 17-70532 and 17-70632]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT C. MUNOZ,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

TARLTON & SON, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

TARLTON & SON, INC.,

Respondent.

ON PETITION FOR REVIEW FROM NATIONAL LABOR RELATIONS BOARD CASE NO. 363 N.L.R.B. NO. 175

PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner, Robert C. Munoz, is an individual.

Dated: April 14, 2017

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I. JURISDICTION STATEMENT

Case No. 16-71915 is a Petition for Review filed pursuant to 29 U.S.C. § 160(f). The Petitioner, Robert Munoz ("Munoz") is a person aggrieved. Tarlton and Son ("Tarlton") has moved to intervene.

Case No. 17-70532 is a Petition for Review filed by Tarlton, which was initially filed in the D.C. Circuit and transferred to this Court pursuant to 28 U.S.C. § 2112. Munoz has moved to intervene.

Case No. 17-70632 is a Petition for Enforcement filed by the National Labor Relations Board ("Board" or "NLRB"). This Court has jurisdiction pursuant to 29 U.S.C. § 160(e). Munoz has intervened in this case.

The agency decision involved in these cases is *Tarlton & Son, Inc.*, 363 N.L.R.B. No. 175 (2016).

There are no time limits for the filing of petitions for review or petitions for enforcement.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Federal Arbitration Act ("FAA") applies to this arbitration procedure where there is no showing that there is a contract that affects interstate commerce or a transaction or dispute that affects interstate commerce?

2. Whether the arbitration procedure is unlawful under the National Labor Relations Act ("NLRA") as applied to the truck driver employed by Tarlton, who is exempt from coverage by the FAA?

3. Whether an arbitration procedure that prohibits class actions is invalid because there are other provisions within the arbitration policy or the company policies that interfere with Section 7 of the NLRA, 29 U.S.C. § 157, rights to effectively use the arbitration procedure?

4. Whether an arbitration procedure is invalid under the NLRA because it would prohibit collective actions or other California state law remedies that are not preempted by the FAA?

5. Whether an arbitration procedure is invalid because it would prohibit group claims that are not class actions, representative actions or other procedural devices available in court or other fora, and thus the FAA is not applicable?

6. Whether an arbitration procedure is invalid because it would require employees to resolve disputes through the arbitration procedure rather than through protected concerted activities such as boycotts, strikes and protected, concerted activity?

7. Whether an arbitration procedure is invalid because it interferes with Section 7 claims by foreclosing group claims brought by a union as the representative of the employees?

8. Whether an arbitration procedure that imposes additional costs on employees than would be imposed in state law proceedings to bring employment-related disputes is invalid under Section 7 of the NLRA?

9. Whether an arbitration procedure is invalid under Section 7 of the NLRA because it would prohibit an employee of another employer from assisting a Tarlton employee or joining with a Tarlton employee to bring a claim?

10. Whether an arbitration procedure is invalid because it applies to parties who are not the employer?

11. Whether an arbitration procedure is unlawful because it interferes with the Section 7 rights of employees to act concertedly together to defend claims by the employer against them?

12. Whether the remedy is adequate?

III. STATEMENT OF THE CASE

This is a Petition for Review from a Decision and Order issued by the Board on April 29, 2016. (E.R. 2.)[1] The Board issued its Decision after an Administrative Law Judge ("ALJ") had issued her Decision on January 27, 2015, finding the employer's policies at issue to be unlawful under the NLRA. The Board denied a Motion for Reconsideration filed by Tarlton on August 26, 2016. (E.R. 1.)

Munoz had filed two unfair labor practice charges against Tarlton in 2014 and First Amended Charges also in 2014. The Consolidated Complaint issued on July 23, 2014. The case was tried before the ALJ on October 15, 2015.

After the ALJ issued her Decision, both Munoz and Tarlton filed Exceptions to the Board, which issued its Decision on April 29, 2016, finding the policies at issue to be unlawful under the NLRA. The Board denied the Exceptions of Munoz and granted in one limited respect the exceptions of Tarlton. (*See* E.R. 2, nn.2 & 5.)

IV. SUMMARY OF ARGUMENT

Tarlton maintained the Mutual Arbitration Policy ("MAP")[2], which prohibits various forms of collective and group actions in arbitration or in courts. Under this Court's decision in *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017), even assuming the FAA applies, the provision violates Section 8 of the NLRA, 29 U.S.C. § 158(a)(1).

The FAA does not apply in this case because there is no evidence that any transaction or controversy arising out of that transaction affects interstate

[1] "E.R." references are to the Excerpts of Record.

[2] Throughout the NLRB proceedings, Munoz referred to this as a Forced Unilateral Arbitration Procedure ("FUAP"). It is not voluntary nor is it mutual. We use Tarlton's misleading nomenclature in this Brief. References to the MAP are to the "Mutual Arbitration Policy." Where we use the abbreviation "MAP," the Court should read it as "Mandatory Arbitration Policy."

commerce. Because there is no such evidence, the FAA cannot be applied, and there is inadequate Commerce Clause jurisdiction. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956).

The MAP has provisions that render it ineffective for employees acting concertedly. For example, it provides for confidentiality, which violates the NLRA and thus renders the MAP itself unlawful on that ground.

The MAP is also invalid on a number of other statutory grounds. For example, it preempts employees from going to various federal and state agencies seeking relief that would extend beyond them or serve an important public purpose.

The MAP is unlawful because it would restrict employees from exercising their rights under state law, where that state law is not preempted by the Federal Arbitration Act. *See Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425 (9th Cir. 2015). The MAP also would prohibit group actions such as boycotting or picketing because the exclusive remedy to resolve disputes is through the MAP, and employees can be disciplined for violation of company policy, including the MAP.

V. ARGUMENT

A. INTRODUCTION

The issue in this case as to whether the FAA overrides the principles of the NLRA as applied to the MAP has been settled by this Court in *Morris*, 834 F.3d 975. *See also Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017), and *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (Jan. 13, 2017). However, all of these cases involved claims brought in Federal Court under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 ("FLSA"). We first argue below that the FAA does not apply.

Munoz presents additional arguments that render the arbitration procedure unlawful under the NLRA, even if the FAA is deemed to govern. Moreover, if the FAA does not apply, then this Court must reexamine *Morris*, 834 F.3d 975, to determine whether the NLRA prohibits such waivers. Although the answer to that question is necessarily that it does, the Court will have to reconsider its view. Primarily, as Munoz argues below, the FAA cannot apply to this dispute because there is no showing that the possible transactions or the contract involved affect interstate commerce. Munoz raises several other issues, which are detailed in the brief below.[3]

B. STANDARD OF REVIEW

The Court is authorized to set aside, in whole or in part, the Board's Decision and Order. The Court should uphold, on appeal, decisions of the NLRB only if its findings of fact are supported by substantial evidence and if the Board correctly applied the law. *See Healthcare Emps. Union, Local 399 v. NLRB*, 463 F.3d 909, 918 (9th Cir. 2006); *Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1151 (9th Cir. 2003); *Cal. Pac. Med. Ctr. v. NLRB*, 87 F.3d 304, 307 (9th Cir. 1996). "When the Board's findings lack such support [of 'substantial evidence'] in the record, the reviewing courts must set them aside, along with the orders of the Board that rest on those findings." *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 782 (1979).

The Court only needs to defer to the Board's interpretation of the NLRA if it is rational and consistent with the NLRA. *See NLRB v. Health Care & Ret. Corp.*

[3] Munoz recognizes that, to some degree, these issues are premature because they could be raised as issues in the Intervenor's Brief or Reply Brief. They are raised here to ensure that there is no waiver of these issues and because they will fundamentally affect the outcome of this case. Furthermore, the Board declined to consider these arguments. (*See* E.R. 2, n.2.) We are not sure of the breadth of that statement contained in the footnote, as to whether it includes the FAA or other issues. We will address that in a Reply Brief if raised by the Board. We also note, *infra*, these arguments are in response to Tarlton's assertion that the FAA governs.

of Am., 511 U.S. 571, 576 (1994). "Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption … of major policy decisions properly made by Congress.'" *NLRB v. Fin. Inst. Emps., Local 1182*, 475 U.S. 192, 202 (1986) (quoting *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965)).

The Board's choice of remedy is subject to an abuse of discretion standard. *NLRB v. Transp. Serv. Co.*, 973 F.2d 562, 566–67 (7th Cir. 1992).

"[Where the] facts below are not contested; we examine only the Board's legal conclusions to determine whether they are irrational or inconsistent with the Act. Our review is also constrained by the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." *Gen. Serv. Emps. Union, Local No. 73 v. NLRB*, 230 F.3d 909, 912 (7th Cir. 2000) (citation omitted).

Additionally, courts do not defer to the Board's interpretation of law outside the NLRA. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202–03 (1991); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have … never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.").

C. THE FAA DOES NOT APPLY

1. Introduction

The Board has never addressed the question of whether the FAA applies to an arbitration procedure without constitutional concerns raised by the Commerce Clause. Nor has the Board addressed the issue of whether the FAA applies to most

employment controversies. We address those issues below.[4]

The provision of the FAA at issue is Section 2, 9 U.S.C. § 2: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable … ."

First, assuming there was a contract evidencing a transaction, there is no showing that such a contract affects commerce. Second, assuming an employment dispute (controversy) is an activity, there is no showing that such future controversy affects commerce. Third, there is no showing that the dispute resolution activity of arbitration affects commerce. Here, Tarlton cannot establish any constitutional or statutory basis to apply the FAA to override the NLRA.

There is no inconsistency in the regulation of activity encompassed within the NLRA and finding a lack of commerce activity regulated by the FAA. The NLRA regulates the employer and its effect on commerce; the activity regulated is activity of employees and employers and labor organizations. *See NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937), and *NLRB v. Reliance Fuel Corp*., 371 U.S. 224 (1963). In contrast, the FAA regulates only a targeted activity: a controversy to be settled by arbitration. The FAA does not purport to apply to employees, unions or employers and their "concerted activities for … mutual aid or protection." 29 U.S.C. § 157. It does not regulate the effect on commerce of the employer's activity. Thus, there is no inconsistency. Here, the Commerce Clause issue is squarely placed. The commerce finding by the Board was only a legal conclusion that Tarlton as an employer was engaged in commerce based on its gross revenues. (E.R. 10.) That allegation is a minimal commerce allegation.

[4] The ALJ correctly found that the FAA did not apply in *Hobby Lobby Stores, Inc.*, 363 N.L.R.B. No. 195 (2016). The Board ignored the issue, and relied on *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, to invalidate the arbitration provision. These arguments were made in *SJK, Inc.*, 364 N.L.R.B. No. 29 (2016) and *FAA Concord H, Inc*., 363 N.L.R.B. No. 136 (2016), and ignored by the Board.

There is no allegation that such revenues had anything to do with any employment dispute. With that bare commerce finding, we proceed to analyze whether the FAA can apply.

This Court must address this constitutional issue, which the Board has avoided, where Tarlton will rely on the FAA for its core argument. Either the FAA applies or it doesn't.

2. The FAA Does Not Apply Since There Is No Contract Evidencing a Transaction Involving Interstate Commerce

By its own terms, the FAA applies only to arbitration provisions that appear in a "contract evidencing a transaction involving commerce" (9 U.S.C. § 2), where commerce is defined as "commerce among the several States or with foreign nations" (9 U.S.C. § 1).

There is no contract in the record other than the arbitration policy. Tarlton claims that the employment relationship is not a contract of employment other than the arbitration procedure.

By its terms, the arbitration procedure is a contract limited to only dispute resolution. Thus, there is no contract evidencing a transaction other than the arbitration procedure. The FAA cannot be applied.

Assuming, however, that the employment relationship is deemed a contract, Tarlton must show that such transaction affects commerce.

The Supreme Court has held that, under this language, "the transaction (that the contract 'evidences') must turn out, *in fact*, to have involved interstate commerce." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995).

Thus, the FAA cannot be applied unless there is proof that the contract containing the arbitration provision evidences a transaction that affects interstate commerce. *Garrison v. Palmas Del Mar Homeowners Ass'n*, 538 F.Supp.2d 468, 473 (D.P.R. 2008) ("[The FAA] only applies when the parties allege and prove that

the transaction at issue involved interstate commerce.") (citing *Medina Betancourt v. La Cruz Azul de P.R.*, 155 P.R. Dec. 735, 742–43 (P.R. 2001)); *Shearson Hayden Stone, Inc. v. Liang*, 493 F.Supp. 104, 106 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981) ("Interstate commerce is a necessary basis for application of the [FAA].").

In *Bernhardt*, 350 U.S. 198, the Supreme Court found that the FAA did not apply to an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of the company's lithograph plant in Vermont. The Court found that the contract did not "evidence 'a transaction involving commerce' within the meaning of § 2 of the [FAA]" because there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce." *Id.* at 200–01.

Similarly, in *Slaughter v. Stewart Enterprises, Inc.*, No. C 07-01157MHP, 2007 WL 2255221 (N.D.Cal. Aug. 3, 2007), the court found that an "employment contract [did] not involve interstate commerce as required by the [FAA]" where an employee "was employed at a single location," "[h]is employment did not require interstate travel," and "his activities while employed with defendants as well as the events at issue in the underlying suit were confined to California." *Id.* at *3. *See also Ambulance Billings Sys., Inc. v. Gemini Ambulance Servs., Inc.*, 103 S.W.3d 507 (Tex.App. 2003) (holding FAA not applicable where services performed were confined to Texas).

There is no evidence that the employment transaction between the parties here involves interstate commerce. Employees who perform work in only one state are not engaged in activity that affects interstate commerce. Here, the ALJ's jurisdictional finding is short on facts. It is simply that: "Respondent purchased and received goods … in excess of $50,000 directly from sources outside the State

of California. … [I]t is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act." (E.R. 10.) There is no other evidence of interstate commerce. Although Tarlton receives goods from out-of-state, (*id.*), disputes that arise between any of its employees and Tarlton may be simple, local disputes governed only by state law, like one missed meal period or rest break. Cal. Lab. Code § 227.3. Some disputes might not even be economic, but simply claims seeking to resolve personality issues or shift assignments or workplace duties between employees. Whether this kind of local dispute is submitted to individual or group arbitration in its final stages will not make any difference for interstate commerce. Yet the arbitration procedure purports to govern all activity, no matter how trivial or local. Such a private arbitration agreement with an individual who does not perform work across state lines, does not transport goods across state lines, and is not seeking to enforce anything other than state law is not a contract evidencing a transaction involving interstate commerce.

The character of Tarlton's construction business does not alter this conclusion. The relevant question here is whether the transaction between the parties has an effect on interstate commerce. The fact that one of the parties to the transaction is independently involved in interstate commerce for other purposes does not bring every contract that party enters, no matter how trivial or local, within the reach of the FAA. Even though Polygraphic Co. was an employer that engaged in interstate commerce and operated lithograph plants in multiple states, the Supreme Court still determined that the arbitration agreement in the employment contract between Polygraphic Co. and Bernhardt did not involve interstate commerce. *Bernhardt*, 350 U.S. at 200–01. Even though Tarlton is engaged in the retail business that may impact interstate commerce, an arbitration agreement between Tarlton and an individual employee who does not perform work across state lines is still an agreement about how to resolve generally local

disputes that does not involve interstate commerce. As the court observed in *Slaughter*, "[t]he existence of national companies … does not undermine the conclusion that the activity is confined to local markets. Techniques of modern finance may result in conglomerations of businesses …. [but] the reaches of the Commerce Clause are not defined by the accidents of ownership." *Slaughter*, 2007 WL 2255221, at *7.

Similarly, even if Tarlton operates nationally, it does not transform the local nature of the employment relationship since those retail activities are not part of the arbitration agreement but are merely incidental to employment transaction. They are not subject to the arbitration procedure. *See Bruner v. Timberlane Manor Ltd. P'ship*, 155 P.3d 16, 31 (Okla. 2006) ("The facts that the nursing home buys supplies from out-of-state vendors … are insufficient to impress interstate commerce regulation upon the admission contract for residential care between the Oklahoma nursing home and the Oklahoma resident patient."); *Saneii v. Robards*, 289 F.Supp.2d 855, 858–59 (W.D. Ky. 2003) (finding the sale of residential real estate to an out-of-state purchaser had "no substantial or direct connection to interstate commerce," since any movements across state lines were "not part of the transaction itself" but merely "incidental to the real estate transaction"); *City of Cut Bank v. Tom Patrick Constr., Inc.*, 963 P.2d 1283, 1287 (Mont. 1998) (concluding that construction contract was a local transaction, not involving interstate commerce, despite purchase of insurance and materials from out-of-state).

Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003), does not change the analysis. In that case, the Supreme Court held that the FAA could be applied in cases where there was no showing that the individual transaction had a specific effect upon interstate commerce, so long as "in the aggregate the economic activity in question would represent 'a general practice … subject to federal control'" and "that general practice need bear on interstate commerce in a substantial way." *Id.*

at 56–57 (citations omitted). Under this standard, the Court found that the application of the FAA to certain debt-restructuring contracts was justified given the "broad impact of commercial lending on the national economy" and the facts that the restructured debt was secured by inventory assembled from out-of-state parts and that it was used to engage in interstate business. *Id.* at 57–58. As other courts have observed, the logic used by the *Alafabco* court to justify the application of the FAA to a large financial transaction between a bank and a multistate manufacturer is not readily applicable to a private arbitration agreement covering claims that a local employment contract has been breached. *Slaughter*, 2007 WL 2255221, at *4 (distinguishing the "debt-restructuring contracts involving a manufacturer" at issue in *Alafabco* from a contract "for service type employment that occurred solely within the state"); *see also Bridas Sociedad Anonima Petrolera Indus. y Comercial v. Int'l Standard Elec. Corp.*, 490 N.Y.S.2d 711, 716 n.3 (Sup.Ct. 1985) (contrasting "an agreement based upon a multimillion dollar transfer of stock between an American and Argentine corporation" and the simple allegation of breach of an employment contract at issue in *Bernhardt*). Private arbitration agreements with employees who do not perform work across state lines, do not transport goods across state lines, and are not seeking to enforce anything other than state law are not contracts that involve interstate commerce in the way major debt-restructuring contracts did in *Alafabco*.

The FAA cannot be stretched so far as to apply to any employment controversy between an individual and her employer just because the employer is, for other purposes, engaged in interstate commerce. Such a reading of the FAA would contravene *Bernhardt* and raise serious constitutional concerns. Moreover, it would render meaningless the language in the statute limiting it to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy … ." 9 U.S.C. § 2.

3. This Case Is Beyond the Constitutional Reach of the FAA Since There Is No Showing That the Activity of Resolving Those Controversies Through Arbitration Affects Interstate Commerce

Under the Commerce Clause, Congress may only regulate "'the channels of interstate commerce,' 'persons or things in interstate commerce,' and 'those activities that substantially affect interstate commerce.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (quoting *United States v. Morrison*, 529 U.S. 598, 609 (2000)). Because the FAA was enacted pursuant to the Commerce Clause (*Perry v. Thomas*, 482 U.S. 483, 490 (1987)), it cannot constitutionally be applied here unless the regulated activity has this connection to interstate commerce.

The fact that the employer in this case is independently engaged in interstate commerce for other purposes cannot supply the necessary connection to commerce, because the FAA is not a regulation of Tarlton or Tarlton's business. In *Sebelius*, the Supreme Court made it clear that Congress may only use its authority under the Commerce Clause "to regulate 'class[es] of *activities*,' … not classes of *individuals*, apart from any activity in which they are engaged." *Sebelius*, 132 S. Ct. at 2590 (first alteration in original) (citation omitted). Thus, in determining whether a regulation is permissible under the Commerce Clause, the court must not look at the class of individuals affected by the law, but at the actual activities that are being targeted by the law. Following this analysis, the Court ruled that the individual mandate could not be characterized as a regulation of individuals who would eventually consume healthcare, because that is just a class of individuals and not the actual activity regulated by the Affordable Care Act. *Id.* at 2590–91. Similarly here, the FAA cannot be characterized as a regulation of employers engaged in interstate commerce, because that is just a class of corporate individuals and not the actual activity regulated by the FAA.

The actual activity regulated by the FAA is the resolution of disputes between private parties. The FAA does not seek to regulate how the employer conducts its business or carries out its commercial activities. The FAA does not purport to regulate any activity other than the narrow aspect of dispute resolution in arbitration. This is the actual activity Congress sought to regulate in the FAA, and such a law passed pursuant to the Commerce Clause cannot be constitutionally applied to the dispute resolution activity here unless this activity is connected to interstate commerce. *See Sebelius*, 132 S. Ct. at 2578.

The activity of resolving disputes between private individuals is not a "channel[] of interstate commerce," it is not a "person[] or thing[] in interstate commerce," and whether the disputes covered by the arbitration procedure here are resolved in individual or group arbitration does not "substantially affect interstate commerce." *Sebelius*, 132 S. Ct. at 2578 (quoting *Morrison*, 529 U.S. at 609). Many of the disputes covered by the arbitration procedure do not implicate interstate commerce or have any substantial effect on interstate commerce. The arbitration procedure is drafted in a way that would extend to any employment dispute. It could encompass a claim for one hour's pay, one missed meal period or rest break, or any other claim that has no impact whatsoever on interstate commerce. It would encompass a claim that was not economic at all, but just an effort to resolve personality issues or shift assignments or workplace duties. If two employees had a "conflict" that was not economic and asked for joint collective arbitration, that dispute would not have any impact on interstate commerce. All non-economic disputes that would have no impact on commerce are covered. Such local disputes governed by state contract law or state labor law lack any substantial connection to interstate commerce. If the dispute does not affect interstate commerce, regulation of the resolution of the dispute is not within the scope of the Commerce Clause, and the FAA cannot constitutionally apply. Whether a dispute

between Tarlton and any of its employees is ultimately resolved in individual or group arbitration does not have an impact on any issue of interstate commerce. Because the employer has not shown that the disputes covered by the arbitration procedure would affect interstate commerce or that the activity of resolving those disputes in individual or group arbitration would affect interstate commerce, the FAA cannot constitutionally be applied here.

Even though the FAA cannot constitutionally target the dispute resolution activity here, the NLRA can constitutionally regulate labor dispute resolution activity between employers and their employees. This is not anomalous. The NLRA was passed pursuant to explicit Congressional findings that "[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce … ." 29 U.S.C. § 151. The Supreme Court has explained that Section 7 of the NLRA embodies the effort of Congress to remedy this problem. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 835 (1984) ("[I]t is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The NLRA can thus reach dispute resolution as a necessary part of its regulation of the employment relationship, designed to address the inequality in bargaining power that burdens interstate commerce. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (recognizing that regulation of local, intrastate activity is permissible as a necessary part of a larger regulatory scheme). Unlike the NLRA, the FAA is not a larger regulation of employment and does not seek to change the fundamental ways employers and workers relate to each other in order to confront the labor

strife that impedes interstate commerce. It seeks to regulate the private dispute resolution activity of individuals apart from its content or context, and this is impermissible.

Congress may not focus on the intrastate dispute resolution activities of private individuals apart from a larger regulation of economic activity. *See United States v. Lopez*, 514 U.S. 549, 558 (1995) ("'[T]he Court [has not] declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities.' Rather, 'the Court has said only that where *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence.'" (first alteration in original) (citation omitted) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 197 n.27 (1968)). The Supreme Court has said that regulation of intrastate activity is permissible where it is one of the "essential part[s] of a larger regulation of economic activity" and the "regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561.

The relevant statutory regime here is the FAA. By its terms, the FAA addresses only individual transactions. 9 U.S.C. § 2 (applying the terms of the act to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce"). Therefore, the regulatory scheme does not encompass wide sectors of economic activity in a general fashion but rather applies to individual transactions or contracts. Regulation of a local dispute that does not itself have any effect on interstate commerce is not a necessary part of the regulatory scheme. Similarly, failure to enforce arbitration provisions in purely intrastate contracts would not subvert the entire statutory scheme in the same way as the failure to regulate purely intrastate marijuana production would undercut regulation of interstate marijuana trafficking. *Gonzales v. Raich*, 545 U.S. 1, 26 (2005). Because regulation of the intrastate activity here is "not an essential part of

a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated," it "cannot … be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Lopez*, 514 U.S. at 561. As a result, there are no constitutional grounds for applying the FAA to intrastate dispute resolution activity that bears only a trivial effect or no effect on interstate commerce. *Bernhardt*, 350 U.S. 198.

4. There is No Controversy Actual or Potential That Affects Commerce

Finally there is no evidence any potential controversies affect commerce. No evidence was offered as to the impact of any potential claims upon commerce. As to the maintenance of the arbitration procedure, it applies to "all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, whether those disputes already exist today or arise in the future." (E.R.47.) This would include disputes over schedules, work assignments, vacation schedules, training, abuse or harassment by supervisors, missing pay, or any insignificant dispute which would have no impact whatsoever on commerce.

The FAA applies to "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … ." 9 U.S.C. § 2. The FAA is only triggered by its terms when there is a "controversy." The absence of any such claim after the implementation of the MAP proves the chilling effect of the arbitration procedure. No claim exists precisely because the arbitration procedure is illegal. Like any unlawful employer maintained rule, the rule effectively chills employees' rights

and thus serves its intended purpose. Until a concrete controversy that demonstrably affects commerce develops, the FAA cannot be applied.

5. Summary

In summary, the FAA does not apply.

D. THE FAA DOES NOT APPLY TO THE TRUCKDRIVER

Tarlton, as a construction industry employer, is engaged in interstate commerce for purposes of the NLRA. It purchases product from out of state for most of its projects, although most of its projects are in the state. (E.R. 10.) Tarlton employs at least one truck driver. (E.R. 30.) The FAA exempts from its application drivers who are involved in interstate commerce, meaning interstate transportation of goods. *See* 9 U.S.C. § 1; *see also Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (discussing transportation exemption). One Court has extensively discussed this issue and stated:

> Thus, reviewing the case law, this Court can see a general trend amongst the circuits. Plaintiffs who are personally responsible for transporting goods, no matter what industry they are in, are "transportation workers" under the FAA exemption. Plaintiffs who oversee the transportation of goods in the transportation industry itself are also "transportation workers" under the FAA exemption.

Veliz v. Cintas Corp., No. C 03-1180 SBA, 2004 WL 2452851, at *6 (N.D. Cal. Apr. 5, 2004) *modified on reconsideration*, No. 03-01180 (SBA), 2005 WL 1048699 (N.D. Cal. May 4, 2005). *See also Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112, at *4 (N.D. Cal. 2016) (occasional delivery of delayed luggage is not sufficient interstate commerce).

Although Tarlton is not involved in the transportation industry, the truck driver who hauls construction material, some of which is purchased from out of state, is a transportation worker and thus within the exclusion.

Even to the extent the FAA may foreclose the NLRA from protecting

Section 7 rights for other employees, it cannot do so for the truck driver.

The Board failed to address that issue in this case. The Board ignored that issue. It is not necessary to reach the Commerce Clause issue as to those employees who are statutorily excluded from the FAA. Since this is a pure statutory issue beyond the expertise of the Board, this Court should find that the arbitration procedure is unlawful as to truck driver.

E. THERE ARE ADDITIONAL REASONS NOT ADDRESSED BY THE BOARD WHY THE FAA CANNOT OVERRIDE THE NLRA

1. There Are Other Federal Statutes That Allow Employees To Seek Relief In a Group or Representative Fashion

The Board failed to address the question of whether the FAA may override the application of the NLRA as to other federal statutes that allow whistle-blowing or independent administrative remedies. As the Board correctly found in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, there are important purposes underpinning Section 7 that are not addressed by the FAA. That equally applies to claims that employees can make under other federal statutes regarding workplace issues. The arbitration procedure provision effectively undermines those other federal statutes. Thus, the MAP interferes with other federal statutory schemes, which envision and, in some cases, require remedies that will affect a group. The Board was forcefully reminded by the Supreme Court in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, that it must respect other federal enactments.[5] Here, the Board failed to recognize that there are many federal statutes that allow group, collective or class claims or even individual claims that affect a group. The FAA cannot be used to defeat the purposes of those statutes.

Employees have the right to bring to various federal agencies many types of issues that affect them and other workers. Under these statutes, they have the right

[5] The assertion by Tarlton that the FAA overrides the NLRA is another example of this principle.

to seek relief from those agencies for their own benefit as well as for the benefit of other workers or employees of the employer. Those remedies which involve substantive rights can involve government investigations, injunctive relief, federal court actions by those agencies, debarment from federal contracts, workplace monitoring and many other remedies that would be collective and concerted in nature.[6]

In effect, the arbitration procedure would prohibit an employee from invoking, on his/her behalf as well as on behalf of other employees, protections of these various federal statutes. It would prohibit the agency or the court from remedying violations of the law that the agency or court would be empowered, if not required, to remedy.

The Congressional Research Service has identified forty different federal laws that contain anti-retaliation and whistleblower protection. *See* Jon O. Shimabukuro, Cong. Research Serv., *R43045, Survey of Federal Whistleblower and Anti-Retaliation Laws* (2013), http://fas.org/sgp/crs/misc/R43045.pdf. These are all laws that relate directly to workplace issues. Nothing in the FAA preempts the application of other federal laws. A few examples are mentioned below.

The federal Fair Labor Standards Act, 29 U.S.C. §§ 201-219, allows for the District Courts to grant injunctive relief to "restrain violations of [the Act]." *See* 29 U.S.C. § 217.[7] The application of the arbitration procedure would prevent an

[6] Member Miscimarra in dissent agrees. (*See* E.R. 8, n.16.)

[7] It is not contradictory to refer to the rights under federal statutes and raise the question of commerce jurisdiction with respect to the FAA. The difference is that the FAA regulates dispute resolution or the employment dispute, not the commerce activity of the employer. There would be, in most cases, federal court jurisdiction over the FLSA claim, but that would not mean that the FAA would also apply based on the same FLSA constitutional commerce standard.

individual or a group of individuals from seeking injunctive relief that would apply to all employees or apply in the future to themselves and other employees.[8]

The same is true with respect to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"). The MAP extends to "all disputes." (E.R. 47.) The arbitration procedure would prohibit an employee from going to court with respect to a claim involving a benefit covered by ERISA, even though the statute expressly allows for equitable relief. 29 U.S.C. § 1132(a)(1) and (3).

The arbitration procedure would prevent employees from bringing a complaint to the Occupational Safety and Health Administration seeking investigation and correction of worksite problems affecting all employees where action after the investigation would be necessary.

The MAP would prevent an employee from filing an EEOC charge that could lead to EEOC court action seeking systemic or class wide relief. It would prevent the employees from participating in systemic charge investigations. 42 U.S.C. § 2000e-8(a). Commissioners may file charges on their own (42 U.S.C. § 2000e-5(b)), which the MAP would prohibit.

The arbitration procedure would prevent employees from bringing unlawful immigration practices to the attention of the Office of Special Counsel. U.S. Dep't of Justice, *Immigrant and Employee Rights Section*, https://www.justice.gov/crt/immigrant-and-employee-rights-Section (last visited Apr. 11, 2017).

It would prohibit anonymous actions. *Does I Thru XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1068 (9th Cir. 2000).

[8] Even a claim by an employee that she was not paid for overtime after forty hours, as required by the FLSA, would not affect commerce if the claim was based on the promise in the handbook to pay overtime. The pursuit of that claim for a few dollars of overtime would not affect commerce for FAA purposes.

The arbitration procedure would prohibit actions under the federal False Claims Act. U.S. Dep't of Justice, *The False Claims Act: A Primer*, http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf. For example, an employee could not claim that, on a federal Davis-Bacon project, the employer made false claims for payment while not paying the prevailing wage. An employee could not claim, along with others, that the employer is overcharging on a government contract. *See United States ex rel. Wall v. Circle C Constr., L.L.C.*, 697 F.3d 345 (6th Cir. 2012). This kind of litigation serves an important public purpose but would be foreclosed by the arbitration procedure. This kind of claim is necessarily brought as a group action, since the relief sought includes a remedy for the underpayment of a group of workers.

The arbitration procedure would prohibit an employee from bringing a claim to the Department of Labor that Tarlton violates the provisions of the Fair Labor Standards Act regarding employment of minors. It would prohibit filing a claim that Tarlton violates the FLSA as to other employees.

The arbitration procedure, by its terms, undermines the enforcement of these federal statutes, which envision private efforts to enforce their purposes for all employees and for the public interest.

There are a multitude of federal laws that govern the workplace. The arbitration procedure prohibits an employee acting collectively or to benefit others from seeking assistance before those agencies and in court to effectuate the purposes of those statutes. Tarlton could discipline an employee who violates this policy. The arbitration procedure would prohibit the employee from doing so for the benefit of employees acting collectively. The purposes of those statutes would include not only individual relief for the employee himself or herself, but also relief that would protect the public interest in enforcement of those statutes.

For these reasons, the arbitration procedure itself is invalid, because it would prohibit an employee from seeking concerted relief with respect to other federal statutes and because it would prohibit employees from seeking relief that would benefit other employees. The FAA cannot serve to interfere with the enforcement of other federal statutes.

2. The Arbitration Policy Prohibits Representative Actions That Are Not Preempted by the FAA under State Law

The California Supreme Court has ruled that an arbitration agreement cannot foreclose application of the Private Attorney General Act, California Labor Code §§ 2699 and 2699.3. *See Iskanian v. CLS Transp.*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). *See also Sakkab*, 803 F.3d 425. *See McGill v. Citibank, N.A.*, No. S224086, 2017 WL 1279700 (Cal. Apr. 6, 2017).

There are numerous other provisions in the California Labor Code that permit concerted action. *See, e.g.*, *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014) (holding that arbitration policy cannot categorically prohibit a worker from taking claims to Labor Commissioner, although state law is also preempted from categorically allowing all claims to proceed before the Labor Commissioner in the face of an arbitration policy).[9]

The MAP would interfere with the substantive right of the California Labor Commissioner to enforce the wage provisions of the Labor Code. *See, e.g.*, Cal. Lab. Code § 217.

There are, additionally, various provisions in the California Labor Code that allow only the Labor Commissioner to award penalties or grant other relief. The enforcement of the MAP would prevent employees from collectively going to the Labor Commissioner seeking these penalties for themselves or other employees. It

[9] Member Miscimarra in dissent agrees that substantive rights cannot be waived. (*See* E.R. 7, n.12.)

would foreclose an employee from asking the Labor Commissioner to seek remedies for a group of employees. *See, e.g.*, Cal. Lab. Code § 210(b) (allowing only the Labor Commissioner to impose specified penalties); Cal. Lab. Code § 218 (authority of district attorney to bring action); Cal. Lab. Code § 225.5(b) (penalty recovered by Labor Commissioner); Cal. Code Regs. tit. 8, § 11160(18)(A)(3). *See also* Cal. Lab. Code §§ 245–249 (sick pay law enforceable by Labor Commissioner). Employees could not collectively seek enforcement of these remedies because the MAP prohibits them from bringing claims collectively to that agency. The Labor Commissioner could not participate in any arbitration procedure since the MAP states that the "parties in any such arbitration will be limited to [the employee] and the Company, unless [the employee] and the Company agree otherwise in writing." (E.R. 48.) It would prevent other public officers from enforcing state law for a class or group upon complaint by employees. *See* Cal. Bus. & Prof. Code § 17204.

Additionally, under state law, there are a number of whistleblower statutes. The MAP would prohibit employees from invoking those statutes for relief that would affect them as well as others. The California Labor Commissioner lists more than thirty-three separate statutes that contain anti-retaliation procedures. *See* Cal. Dep't of Indus. Relations, *Laws that Prohibit Retaliation and Discrimination* (Sept. 2016), http://www.dir.ca.gov/dlse/HowToFileLinkCodeSections.htm. California has strong statutory protection for whistleblowers. *See* Cal. Lab. Code §§ 1101-1105. The MAP defeats the purposes of those statutes that allow groups to bring claims forward to vindicate the public purpose animating those provisions.

The MAP is invalid because it prohibits the exercise of these state law rights, which serve an important public purpose. The burden is on Tarlton to prove that the MAP does not interfere with other non-preempted state laws.

3. The Arbitration Policy Unlawfully Prohibits Group Claims That Are Not Class Actions, Representative Actions, Collective Actions Or Other Procedural Devices Available In Court Or Other Fora

The cases focus on the rights of employees to use collective procedures in courts and other adjudicatory fora. Employees have the right to bring their collective disputes together as a group, or an individual can represent others to bring a group complaint. The MAP prohibits such group claims or consolidation.[10]

This is an essential point, which responds to the repeated dissents of Board members and the holdings of the courts.[11] They opine that class and collective actions are created by court rules and that Section 7 cannot override those procedural and substantive creations of courts.[12] Where these claims are brought by two or more employees, there is no need to invoke class action, collective action or any procedural format. It is just two or more employees bringing the same claim and assisting each other. Alternatively, it can be two or more employees bringing a complaint that would require the participation of other employees and would affect them such as a necessary party. Or it may be a claim that effectively requires the participation of other employees such a claim which affects work assignments, vacation scheduling and so on. Such group claims stand apart from class actions, collective actions and representative actions that invoke court adopted procedures.[13]

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[10] As to this theory, this avoids the argument that employees do not have the right to invoke the formalized procedures available in court such as class actions or collective actions.

[11] Member Miscimarra in dissent agrees that his reasoning does not extend to the assertion of rights that do not involve court created class action or collective action procedures. (*See* E.R. 8, n.16.)

[12] Then-member Miscimarra's dissent focuses on the question of whether the Board can restrict such procedural creations of the courts. (*See* E.R. 5-8.) This argument avoids that issue.

[13] Since the truck driver is not covered by the FAA, she would have the right to engage in activity with other employees.

4. The Arbitration Policy Is Invalid And Interferes With Section 7 Rights To Resolve Disputes By Concerted Activity of Boycotts, Banners, Strikes, Walkouts And Other Activities

The arbitration procedure is invalid because it makes it clear that the employees are limited to the MAP procedure to resolve disputes. It applies to all disputes, not just disputes that could be brought in a court or before any agency. It governs "all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, whether those disputes already exist today or arise in the future." (E.R. 47.) This would foreclose the employees from engaging in strikes or boycotting activity, expressive activity or other public pressure campaigns. This is a yellow dog contract prohibited by the Norris-LaGuardia Act, 29 U.S.C. § 102. Here, employees are forced to agree that they shall use only the arbitration procedure to resolve disputes with Tarlton, and thus they would be violating the arbitration procedure if they were to use another, more effective, forum, such as a public protest or a strike.[14] Any employee who violates this rule would be subject to discipline just as he/she would be for violating any other employer rule.

This is an illegal forced waiver of the Section 7 right to engage in lawful economic activity, including boycotting, picketing, striking, leafleting, bannering and other expressive activity. That concerted activity could also include seeking a Union's assistance in negotiating a better arbitration provision or in invoking the Arbitration Policy. The Board's recognition that the FAA is an unlawful yellow dog contract under the Norris-LaGuardia Act reaffirms that but does not go far

[14] Member Miscimarra in dissenting suggests the MAP would allow strike activity. (*See* E.R. 7, n.11.) The majority did not adopt this reasoning, and since the MAP makes it clear that the arbitration procedure "will govern any existing and all future disputes between you and the Company that relate in any way to your employment," it is not clear how the MAP allows any other method of dispute resolution. (*See* E.R. 47.) It offers no exceptions, implied or otherwise. Tarlton has not asserted that it would permit any such activity.

enough. If the Arbitration Policy is unlawful under the Norris-LaGuardia Act and Section 7, it is unlawful because it prohibits other concerted means of resolving disputes. Employees are not limited to bringing claims concertedly before courts or agencies;[15] they can do so by direct action.

5. The MAP Is Unlawful Because It Is Confidential, and Workers Cannot Disclose the Proceedings

The Board failed to address the confidentiality provision which is unlawful. The MAP adopts the American Arbitration Association Employment Rules.[16] (*See* E.R. 48.) Those rules are available in American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures* (Nov. 1, 2009), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362. The confidentiality provision at page 24 of the AAA rules is overbroad since an employee would have the right to disclose to other workers the proceedings, results, evidence, etc. Other workers would not have the right to attend and observe. It would prohibit employees from disclosing collective action under the MAP or would prohibit one employee who invoked the MAP from disclosing the outcome. It would prevent one employee from disclosing a favorable decision, which another employee could use.[17]

It is well settled that rules prohibiting employees' discussion of their wages, hours, or other terms and conditions of employment violate Section 8(a)(1) of the NLRA. *MCPc, Inc.*, 360 N.L.R.B. No. 39 (2014); *Flex Frac Logistics, LLC*,

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[15] Surely, every employer would rather force employees to resolve disputes in the least friendly fora: the courts and arbitration. The Norris-LaGuardia Act and the NLRA protect the right of employees to settle disputes in the most effective manner, which is collective action in the workplace. *See On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189 (2015).

[16] Arbitration agreements that incorporate AAA rules are valid. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

[17] This forecloses the use of issue or claim preclusion against Tarlton.

358 N.L.R.B. 1131 (2012), *enforced*, 746 F.3d 205 (5th Cir. 2014); *see also Scientific-Atlanta, Inc.*, 278 N.L.R.B. 622, 624–25 (1966).

For the reasons addressed above, the confidentiality provision in the MAP[18] contained in the American Arbitration Association rules renders the MAP unlawful.

6. THE MAP IS VOID UNDER STATE LAW BECAUSE IT IS RETROACTIVE.

The Board failed to address the issue that MAP is retroactive and therefore attempts to void vested rights. By its terms it applies to "all disputes relating to or arising out of or in connection with employment at the Company or the termination of that employment, whether those disputes already exist today or arise in the future … ." (E.R. 47.) The MAP is void since it is retroactive and would apply to the vested rights that employees would have to bring collective or class claims that had arisen before the implementation of the policy to court or to any agency. *See Asmus v. Pac. Bell*, 999 P.2d 71, 79 (Cal. 2000) (employer may not interfere with vested benefits). As noted above, moreover, the MAP, as a retroactive agreement, cannot be subject to FAA application or preemption.

7. THE MAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS BECAUSE IT IS MUTUAL AND RESTRICTS THE RIGHT OF WORKERS TO ACT TOGETHER TO DEFEND CLAIMS BY THE EMPLOYER AGAINST THEM.

The Board failed to address this issue.

Employees have the right to band together to defend against the claims made by the Employer. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to do so where there are

[18] *See, e.g.*, *Carmona v. Lincoln Millennium Car Wash, Inc.*, 226 Cal.App.4th 74, 79, 89 (2014) (confidentiality clause that is one-sided renders arbitration agreement substantively unconscionable).

joint or related claims against several employees. The MAP is unlawful for this reason.

The MAP is also unlawful because it is mutual. The MAP specifically encompasses claims by employees against the company as well as claims by the company against workers. This imposes a very heavy burden on employees who may be jointly the subject of a claim by the company against them. Under the MAP, they could not jointly defend themselves but would have to defend themselves individually in separate actions. It is not difficult to imagine a circumstance where the employer may have claims against multiple employees, such as overpayments for wages. The employees are entitled to defend such claims jointly and concertedly.[19] The MAP is facially invalid since it prohibits group action to defend against claims jointly.[20]

The MAP also prohibits employees from naming joint employers or making a claim against the company and its "owners, employees, officers, directors or agents" because no other party can be joined. Because parties have the right to join all parties or agents in an action, these are substantive limitations, which are not privileged by the FAA.

[19] The MAP specifically prohibits consolidation. This would be useful procedure for employees to concertedly defend claims.

[20] For example, employees would have to hire lawyers who would cost more for individual representation.

8. Summary

There are a number of provisions in the MAP that undermine, interfere with and restrict the right of employees to bring claims collectively or as a group and render the MAP unlawful.[21]

F. THE MAP IS UNLAWFUL AND INTERFERES WITH SECTION 7 RIGHTS

1. The MAP Is Unlawful Because It Imposes Additional Costs On Employees To Bring Employment Related Disputes

The Board did not address this issue.

The MAP is unlawful under state and federal law. The MAP contains another serious impediment to single or even any group action. Arbitration is exceedingly expensive. Workers can jointly file, without fee or expense, a claim with the California Labor Commissioner and other agencies without a filing fee or other costs. This is true of most administrative agencies. The MAP imposes arbitration fees and costs up to "your local court civil filing fees." The fee is $435.[22] The MAP requires each individual to pay the fee up to $435. If the workers could combine their cases, they could share that fee. Thus, prohibiting

[21] We emphasize that each of these arguments voids any argument that the FAA can apply to truncate the rights under the NLRA. Thus, they do not exceed the theory of the General Counsel's complaint since these arguments are raised to defeat Tarlton's claim that the FAA governs. (*See* E.R. 2, n.2.) These arguments are not advanced to create a different theory of liability, they rebut Tarlton's arguments. To the extent Tarlton's reliance on the FAA is, in effect, an affirmative defense, these arguments serve to defeat that affirmative defense.

[22] Superior Court of California, *Statewide Civil Fee Schedule* (Jan. 1, 2017), http://www.fresno.courts.ca.gov/fees_schedule/documents/Statewide Civil Fee Schedule January 2017.pdf. The initial fee is not the only fee that is imposed. There are subsequent fees for motions and other matters. There is an additional fee for courthouse construction, which can be over $200. *See id*. Thus, a worker could pay substantially more than $435 for a wage claim. If the claim were less than $25,000, the amount could be reduced.

employees from joining cases imposes a monetary penalty and is coercive and violates Section 8(a)(1).[23]

The MAP imposes a penalty on employees who would bring group claims (and, again, not necessarily class claims) because each employee would have to bear the cost of the individual arbitration rather than share the cost among a group of employees who choose to act concertedly.[24] The MAP requires employees to pay to exercise their Section 7 rights where, by group action, they could reduce their costs or eliminate them entirely. There is no reported Board case yet that allows an employer to put an economic price or penalty on the exercise of Section 7 rights.

Because the MAP imposes a cost of at least $435 on each individual worker, it is unlawful because many agencies allow claims without a fee. This imposes a substantial penalty on workers who are thus foreclosed from remedying their workplace issues. It imposes a monetary penalty because each individual worker has to pay at $435 to bring his or her claim when, if they could do it collectively, they could share the filing fee costs.[25] They could also share the cost of legal or other representation.

Moreover, the provision prohibits effective vindication of wage and hour claims. The Board noted that class and collective actions allow employees to pool their claims and resources for the greater collective good. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72. *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). "[T]he class action device is the only economically rational alternative

[23] If four workers joined together, it would cost each of them a little over $100 to file in Court. This illustrates that the MAP makes it more expensive to bring claims and is facially invalid under section 8(a)(1).

[24] It also makes hiring a lawyer prohibitively expensive since workers could not effectively share the cost in separate proceedings.

[25] They could also share litigation expenses such as discovery costs of depositions, expert witnesses and so on.

when a large group of individuals … has suffered an alleged wrong, but the damages due to any single individual … are too small to justify bringing an individual action." *In re. Am. Express Merchs. Litig*., 634 F.3d 187, 194 (2d Cir. 2011). The potential recovery in an individual wage case, particularly one involving low-paid workers, may be so small that no rational person would be willing or able to pursue it unless as part of a larger class or collective action. *See, e.g., Scholtisek v. Eldre Corp*., 229 F.R.D. 381, 394 (W.D.N.Y. 2005) Thus, group participation in joint, class, and collective actions regarding conditions of employment is an essential method of workplace organization and "at the core of what Congress intended to protect by adopting the broad language of Section 7." *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2279 (2012). The Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), does not change this. There is no practical way workers can bring minimum wage, overtime and similar claims as individuals with these costs facing them unless they do so collectively. Thus, the MAP expressly penalizes workers by increasing their costs[26] in violation of Section 7.

2. The MAP Is Unlawful Because It Would Prohibit an Employee of Another Employer From Assisting a Tarlton Employee or Joining With a Tarlton Employee To Bring a Claim

The Board did not address this issue. Separately, an employee of any other employer is also an employee within the meaning of the NLRA. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978). Such other employee could assist an employee of Tarlton or join with a claim brought by a Tarlton employee. The rights of all other employees of other employers are violated by the MAP independently of whether it violates just the Section 7 rights of Tarlton employees. The MAP cannot apply

[26] Even if the additional cost is the filing fee of more than $400 there is no "de minimis" exception to the right to engage in Section 7 activity. This is an unlawful toll which employees must pay to exercise their rights.

to an employee of another employer, nor can it prohibit a Tarlton employee from joining with an employee of another employer.

Furthermore, it would prohibit employees of Tarlton from "join[ing] or consolidat[ing] claims in arbitration with others," which includes people who are not parties to the MAP.[27] (E.R. 48.)

Here, moreover, it discourages union activity where the employees have selected a union as their representative but are precluded from engaging the union to pursue group claims on their behalf. It would prohibit a union that represents employees from bringing any claim on behalf of represented employees.

3. The MAP Is Unlawful and Interferes With Section 7 Rights Because It Applies To Parties Who Are Not the Employer But May Be Agents of the Employer or Employers of Other Employees Under The Act

The MAP is invalid because it applies to other employers. The MAP extends to disputes with the Company, its "affiliated companies or entities, and all of their owners, employees, officers, directors or agents … ." (E.R. 11-12.) None of the other named parties is bound to arbitrate claims against the employee except the Company itself. The MAP does not bind the "affiliated companies or entities, and all of their owners, employees, officers, directors, agents." Each of these persons could be an employer or joint employer within the meaning of the Act. Yet, the employee is bound to arbitrate claims against those individuals where those claims arise out of wages, hours and working conditions to the extent they are the employer.[28]

There are many wage and hour statutes that can impose joint liability. The MAP prohibits Section 7 activity against parties who are not the employer and thus

[27] This conduct is inherently destructive of section 7 rights because it limits section 7 activity on its face without a business justification. *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), and *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

[28] *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

is overbroad and invalid. This would affect the employees' right to bring claims against joint employer relationships. *See Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015).

4. The MAP Is Unlawful and Interferes With Section 7 Rights Because It Restricts the Right of Workers To Act Together To Defend Claims By the Employer Against Them

Employees have the right to band together to defend against claims made by the Employer or other employees. Although an employee might choose to refrain from concerted activity against the employer, that employee may wish to engage in joint activity where there are joint or related claims against several employees. Under the MAP, they could not jointly defend themselves but would have to defend themselves individually in separate actions. There may be cross-claims, counter-claims or claims for indemnification. The MAP is facially invalid since it prohibits group action to defend against claims jointly.[29]

5. The MAP Is Unlawful Under The Norris-LaGuardia Act

The Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, states that, as a matter of public policy, employees "shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of … representatives [of their own choosing] or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 102. The act declares that any "undertaking or promise in conflict with the public policy declared in Section 102 … shall not be enforceable in any court of the United States … ." 29 U.S.C. § 103. The MAP plainly interferes with the rights guaranteed by this federal law. The FAA does not eliminate the rights guaranteed by the Norris-LaGuardia Act. This argument is fully explored in the

[29] For example, employees would have to hire lawyers who would cost more for individual representation. Employees could not share the costs of expert witnesses, document production, depositions, etc. The simple fact that individual actions increase the costs on the workers makes it a penalty and violates section 7.

law review article written by Professor Matthew Finkin, *The Meaning and Contemporary Vitality of the Norris-LaGuardia Act*, 93 Neb. L. Rev. 6 (2014). He forcefully argues that an agreement to waive collective actions is a quintessential yellow dog contract prohibited by the Norris-LaGuardia Act. We repeat this here to reinforce our arguments. *See Epic Sys. Corp.*, 823 F.3d 1147.

VI. THE REMEDY IS INADEQUATE

The Board's Notice and the Decision of the Board should be mailed to all employees. The Board only requires that Tarlton "[n]otify all current and former employees who were required to sign or otherwise become bound to the mutual arbitration policy in any form that it has been rescinded or revised … ." (E.R. 4.) This notification without further explanation of what occurred in the proceedings is not adequate notice for employees. The entire Board Decision should be mailed to former employees and provided to current employees.

Moreover, the Board's Order requiring Tarlton to notify "current and former employees" extends only to the rescission of the policy when the Board Order also refers to the unlawful promulgation of the policy. The Board found that Tarlton illegally promulgated the policy. The notice to employees is misleading because it contains only a portion of the findings and the Board's required notice. The Board has not explained why it requires such a misleading notice to employees. The notice should be complete to include all of the findings and the Order of the Board.

Because the order allows a "revision," it should toll any claim that was not brought because of the maintenance of the policy. "Equitable tolling [is] a long-established feature of American jurisprudence derived from 'the old chancery rule' … ." *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014). To the extent that the laws are state law rights, state law would generally govern. California has a generous equitable tolling doctrine. *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 194 P.3d 1026 (Cal. 2008). Here, tolling is particularly appropriate because

employees were prohibited from bringing any collective or group actions. In order to remedy this unlawful restriction, the statute of limitations under any federal or state law should be tolled. The "revision" allowed should include tolling.

VII. CONCLUSION

For the reasons suggested above, this Court should affirm the Board's finding that the MAP violates Section 7. It should, however, find first that the FAA does not apply. Should, however, the Supreme Court reverse this Court's decision in *Morris*, 834 F.3d 975, and the two other cases, this Court should either address or require the Board to address the other issues raised in this brief that would invalidate the MAP, irrespective of the FAA.

Dated: April 14, 2017

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ David A. Rosenfeld
DAVID A. ROSENFELD

Attorneys for Petitioner and Intervenor,
ROBERT C. MUNOZ

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-1.1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 16-71915

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 28-1.1.
The brief is 11,082 words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant /s/ David A. Rosenfeld

Date April 14, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6(c), Respondent is unaware of any related cases pending in this Circuit.

Dated: April 14, 2017

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ *David A. Rosenfeld*
DAVID A. ROSENFELD
Attorneys for *Petitioner and Intervenor*, ROBERT C. MUNOZ

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on April 14, 2017, I electronically filed and served the forgoing **PETITIONER'S OPENING BRIEF** with the United States Court of Appeals For the Ninth Circuit by using the Court's CM/ECF system.

I further certify that counsel for parties listed below are registered users who have been served through the CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on April 14, 2017.

/s/ Karen Kempler
Karen Kempler